

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BERKLEY INSURANCE COMPANY, a
foreign insurer,

Plaintiff,

v.

PHILADELPHIA INDEMNITY
INSURANCE COMPANY, a foreign insurer,
FIRST RESPONSE, INC., an Oregon
corporation, CLARK COUNTY, a
Washington municipal corporation, and
ALLEN BRICKER, an individual,

Defendants.

Cause No.

**COMPLAINT FOR DECLARATORY
RELIEF**

Plaintiff Berkley Insurance Company submits the following Complaint for Declaratory Relief.

I. PREAMBLE

This Declaratory Judgment Action is brought by Berkley Insurance Company as the Reinsurer for Washington Counties Risk Pool in order to obtain a judicial determination as to the priority of payment for any indemnity obligation owed to Clark County in regard to the matter entitled *Bricker v. Clark County et al.*, Cause No.: 16-2-00253-0, filed in Clark County Superior

1 Court, under the policies issued by Philadelphia Indemnity Insurance Company and the
2 Memorandum of Coverage issued by Washington Counties Risk Pool.

3 II. PARTIES

4 2.1 Plaintiff Berkley Insurance Company (“Berkley”) is a foreign insurer organized
5 under the laws of the State of Delaware with its principal place of business located in Greenwich,
6 Connecticut.

7 2.2 Defendant Philadelphia Indemnity Insurance Company (“PIIC”) is a foreign
8 insurance company organized under the laws of the Commonwealth of Pennsylvania with its
9 principal place of business located in the Commonwealth of Pennsylvania.

10 2.3 Defendant First Response, Inc. (“First Response”) is a private security company
11 organized under the laws of the State of Oregon, with its principal place of business located in
12 the State of Oregon.

13 2.4 Defendant Clark County (“the County”) is a Washington municipal corporation.

14 2.5 Defendant Allen Bricker (“Bricker”) is a citizen of the State of Washington,
15 residing in Vancouver, Washington.

16 III. JURISDICTION AND VENUE

17 3.1 This Court has jurisdiction over this claim pursuant to 28 U.S.C. §1332 as the
18 amount in controversy exceeds \$75,000.00, exclusive of interest and costs, and diversity amongst
19 the parties is complete.

20 3.2 Venue is proper with this Court pursuant to 28 U.S.C. § 1391 as this case involves
21 claims for insurance coverage involving Defendants, all of whom are either residing in or
22 conducting business in Clark County, Washington and the loss giving rise to those claims
23 occurred in Clark County, Washington.

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IV. RELEVANT FACTS

A. Background

4.1 Defendant Bricker was an employee of the Veteran's Administration Northwest Health Network (the "VA") in Vancouver, Washington, which leased office space in the Clark County Center for Community Health.

4.2 First Response was the security contractor retained by the County for the subject property.

4.3 Deborah Lennon ("Lennon"), a former employee of the VA from 2012 to 2014, engaged in a series of incidents in which she contacted and/or confronted Bricker.

4.4 Bricker claims that he requested additional security measures be provided by Clark County and/or First Response in light of Lennon's behavior.

4.5 On or about February 4, 2014, Bricker was working in the scope of his employment at the VA when Lennon entered the facility and shot Bricker twice in the back.

4.6 Lennon was prosecuted and is currently serving a 22-year sentence for attempted murder.

4.7 Bricker brought suit against the County and First Response in a lawsuit filed in Clark County Superior Court entitled, *Bricker v. Clark County et al.*, Cause No.: 16-2-00253-0 ("Underlying Lawsuit").

B. The Clark County/First Response Contract

4.8 Upon information and belief, the contract between the Clark County and First Response includes the following pertinent provisions:

- A. At the execution of this contract, the Contractor must provide an original ACORD Form with the Commercial General Liability (CGL) Insurer or Business Owners Policy (BOP), . . . all or either with broker of record, insurance limit(s), renewal dates, deductible less than \$5,000 . . . , and

\$1,000,000 annually. . . In all cases, the Contractor’s policy is primary and they waive their right of subrogation except for gross negligence by the County.

...

D. Additional Insured: the Contractor agrees to endorse Clark County as an “Additional Insured” on the Commercial General Liability Policy (CGL), BOP, or Builder’s Risk policies with the following or similar endorsement providing equal or broader additional insured coverage, the CG2026 07 04 Additional Insured – Designated Person or Organization endorsement; or the CG2010 10 01 Additional Insured – Owners, Contractor, or Subcontractor endorsement, including the “additional insured” endorsement of CG2037 10 01 Additional Insured - Owners, Contractor, or Subcontractor – Completed operations, shall be required to provide back coverage for the Contractor’s “your work” as defined in the policy and liability arising out of the products-completed operations hazard. The Additional Insurance Endorsement shall read “Clark County Washington”.

C. The Philadelphia Indemnity Insurance Company Insurance Policies

4.9 PIIC issued Commercial General Liability and Commercial Excess Liability Policies to First Response.

4.10 Those PIIC Policies were in full force and effect at the time of the loss that is the subject of the Underlying Lawsuit.

4.11 The County qualifies as an additional insured under each of the policies issued by PIIC.

1. The PIIC Commercial General Liability Policy

4.12 PIIC issued a commercial general liability policy of insurance to First Response as policy number PHPK1032194 (“PIIC CGL Policy”).

4.13 The PIIC CGL Policy has a \$1,000,000 per occurrence limit.

4.14 The PIIC CGL Policy contains a blanket additional insured provision that provides the following:

f. Blanket Additional Insureds by Contract – Any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for “bodily injury,” “property damage” or “personal and advertising injury” caused in whole or in part, by:

- (1) Your acts or omissions; or
- (2) The acts or omissions of those acting on your behalf;

In the performance of your ongoing operations for the additional insured.

4.15 The PIIC reservation of rights letter issued to Clark County on July 15, 2015 acknowledges Clark County as an additional insured for purposes of the PIIC CGL Policy.

4.16 The PIIC CGL Policy has an Other Insurance provision that states as follows:

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when paragraph b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph c. below.

b. Excess Insurance

This insurance is excess over:

- (1) Any of the other insurance, whether primary, excess, contingent or on any other basis:
 - (a) That is Fire, Extended Coverage, Builder’s Risk, Installation Risk or similar coverage for “your work”;

- 1 (b) That is Fire insurance for premises rented to
2 you or temporarily occupied by you with
3 permission of the owner;
4 (c) That is insurance purchased by you to cover
5 your liability as a tenant for “property
6 damage” to premises rented to you or
7 temporarily occupied by you with
8 permission of the owner; or
9 (d) If the loss arises out of the maintenance or
10 use of aircraft, “autos” or watercraft to the
11 extent not subject to Exclusion g. of Section
12 I – Coverage A – Bodily Injury And
13 Property Damage Liability
14

- 15 (2) Any other primary insurance available to you
16 covering liability for damages arising out of the
17 premises or operations, or the products and
18 completed operations, for which you have been
19 added as an additional insured by attachment of an
20 endorsement.

21 When this insurance is excess, we will have no duty
22 under Coverages A or B to defend the insured
23 against any “suit” if any other insurer has a duty to
defend the insured against that “suit”. If no other
insurer defends, we will undertake to do so, but we
will be entitled to the insured’s rights against all
those other insurers.

When this insurance is excess over other insurance,
we will pay only our share of the amount of the
loss, if any, that exceeds the sum of:

- (1) The total amount that all such other
insurance would pay for the loss in the
absence of this insurance; and
(2) The total of all deductible and self-insured
amounts under all that other insurance.

We will share the remaining loss, if any, with
another other insurance that is not described in this
Excess Insurance provision and was not bought
specifically to apply in excess of the Limits of
Insurance shown in the Declaration of this
Coverage Part.

2. *The PIIC Commercial Excess Liability Policy*

4.17 PIIC also issued a commercial excess liability policy to First Response as policy number PHUB423776 (“PIIC Excess Policy”).

4.18 The PIIC Excess Policy includes a description in the policy describing “Who is an Insured” as: “any person or organization insured under any policy of the ‘underlying insurance,’” as that term is defined.

4.19 The PIIC Excess Policy includes the following definition of “Underlying Insurance”:

17. “Underlying insurance” means the policies listed in the Schedule of Underlying Insurance and includes:

- (a) Any renewal or replacement of such policies, and
- (b) Any other insurance available to the insured.

4.20 For the purposes of the PIIC Excess Policy, the PIIC CGL Policy is the “underlying insurance”.

4.21 The PIIC Excess Policy includes an Other Insurance provision that states as follows:

10. Other Insurance

This insurance is excess over any other valid and collectible insurance whether such other insurance is stated to be primary, contributing, excess, contingent or otherwise.

4.22 The PIIC Excess Policy provides coverage up to the \$8,000,000 limit.

4.23 The PIIC reservation of rights letter issued to Clark County on July 15, 2015 acknowledges Clark County as an additional insured for purposes of the PIIC Excess Policy.

1 3. *The Washington Counties Risk Pools Memorandum of Coverage*

2 4.24 At the time of the loss that is the subject of the Underlying Lawsuit, Clark County
3 was a participant in a Joint Self-Insurance Memorandum of Coverage provided by Washington
4 Counties Risk Pool (“WCRP”).

5 4.25 WCRP is expressly excluded from the definition of “insurer” under Washington
6 law. RCW 48.01.050.

7 4.26 The WCRP Memorandum of Coverage (“MOC”) contains an Other Insurance
8 provision which provides, in pertinent part, as follows:

9 **Other Insurance:** The joint self-insurance afforded by this policy
10 is secondary to and excess of any valid and collectible insurance
11 which is available to the insured.

12 4.27 Berkley is a Reinsurer for the WCRP MOC. As a result, Berkley has a real
13 financial interest in determining respective coverage obligations owed by PIIC and WCRP.

14 **V. THERE IS AN ACTUAL AND JUSTICIABLE CONTROVERSY AS TO THE
15 RIGHTS AND OBLIGATIONS OF THE PARTIES TO THE PIIC INSURANCE
16 POLICIES AND THE MOC**

17 5.1 Pursuant to the PIIC CGL Policy and the PIIC reservation of rights letter, Clark
18 County qualifies as an Additional Insured with respect to any liability that the County has that
19 was caused “in whole or in part” by the acts or omissions of First Response.

20 5.2 There is an actual and justiciable controversy as to whether the PIIC CGL Policy
21 covers Clark County as an Additional Insured for any liability attributed to Clark County in the
22 Underlying Lawsuit.

23 5.3 The Other Insurance provision in the PIIC CGL Policy provides, in pertinent part,
that the PIIC CGL insurance is primary over other available insurance unless the other insurance
available is also primary.

1 5.4 There is an actual and justiciable controversy as to whether the WCRP MOC
2 qualifies as “other available insurance” under Washington law.

3 5.5 Pursuant to the PIIC Excess Policy and the PIIC reservation of rights letter, Clark
4 County qualifies as an Additional Insured under the PIIC Excess Policy issued to First Response.

5 5.6 There is an actual and justiciable controversy as to whether the PIIC Excess
6 Policy provides indemnity to Clark County as an additional insured for any liability attributed to
7 Clark County in the Underlying Lawsuit.

8 5.7 The Other Insurance provision in the PIIC Excess Policy provides, in pertinent
9 part, that the PIIC Excess Policy is excess over any other valid and collectible insurance whether
10 such other insurance is stated to be primary, contributing, excess, contingent, or otherwise.

11 5.8 The Other Insurance provision in the WCRP MOC provides in pertinent part that
12 the joint self-insurance afforded is secondary to and excess of any valid and collectible insurance
13 which is available to Clark County.

14 5.9 There is an actual and justiciable controversy as to whether the WCRP MOC is
15 excess over the PIIC CGL Policy.

16 5.10 There is an actual and justiciable controversy as to whether the WCRP MOC is
17 excess over the PIIC Excess Policy.

18 5.11 Based on the PIIC Policies and the WCRP MOC, as well as clear Washington
19 law, the priority of payment for any indemnity obligation owed to Clark County for any liability
20 assessed to the County in the Underlying Lawsuit is as follows:

- 21 • Primary Indemnity – The PIC Commercial General Liability policy;
22 • First Excess Layer – The PIC Commercial Excess Liability policy;
23 • Second Excess Layer – The WCRP Memorandum of Coverage

1 5.12 There is an actual and justiciable controversy as to the priority of payment for any
2 indemnity obligations associated with any liability assessed to the County in the Underlying
3 Lawsuit.

4 **VI. FIRST CAUSE OF ACTION – DECLARATORY RELIEF**

5 6.1 Berkley is entitled to Declaratory Judgment in its favor, specifically including a
6 judicial determination that the PIIC CGL Policy issued to First Response provides the primary
7 layer of indemnity coverage for any liability that is assessed to Clark County in the Underlying
8 Lawsuit.

9 6.2 Berkley is further entitled to Declaratory judgment in its favor, specifically
10 including a judicial determination that the PIIC Excess Policy is the first excess layer of
11 insurance available to Clark County for any and all liability assessed to the County in the
12 Underlying Lawsuit.

13 6.3 Berkley is further entitled to Declaratory Judgment in its favor, specifically
14 including a finding that the coverage provided by the WCRP MOC is excess over the PIIC CGL
15 and Excess Policies for any liability assessed to the County in the Underlying Lawsuit.

16 6.4 Berkley is further entitled to Declaratory Judgment in its favor, specifically
17 including a finding that the priority of payment for an indemnity obligation to Clark County for
18 any liability assessed to the County in the Underlying Lawsuit is as follows:

- 19 • Primary Indemnity – The PIC Commercial General Liability policy;
20 • First Excess Layer – The PIC Commercial Excess Liability policy;
21 • Second Excess Layer – The WCRP Memorandum of Coverage

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VII. PRAYER FOR RELIEF

Plaintiff Berkley Insurance Company, having alleged the foregoing, does now, hereby, pray for relief as follows:

7.1 For a declaration that the WCRP MOC is excess over all insurance provided by the PIIC CGL and Excess Policies for any liability that is assessed against the County in the Underlying Lawsuit.

7.2 For a declaration that the priority of payment for any indemnity obligation owed to the County for any liability assessed against the County in the Underlying Lawsuit is as follows:

- Primary Indemnity – The PIC Commercial General Liability policy;
- First Excess Layer – The PIC Commercial Excess Liability policy;
- Second Excess Layer – The WCRP Memorandum of Coverage

7.3 For any and all further declaratory relief to which Berkley may be entitled.

7.4 For attorney fees and costs allowed by statute and law.

7.5 For any interest allowed under Washington law.

7.6 For other and further relief as the Court deems just and equitable.

DATED this 8th day of June, 2018.

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/s/ Eric J. Neal

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